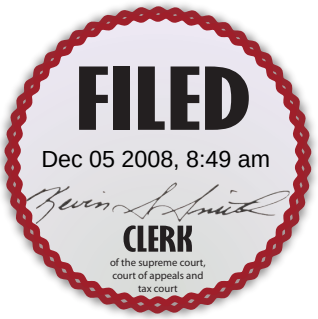

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IN THE
COURT OF APPEALS OF INDIANA

TERESA HEATH,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 48A02-0804-CV-329
	)	
TIMOTHY HEATH,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Judge
Cause No. 48D03-0711-DR-1376

December 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Teresa Heath ("Mother") appeals the trial court's order modifying child support payable by Timothy Heath ("Father"). On appeal, Mother raises one issue, which we restate as whether the trial court's calculation of child support is clearly erroneous.[1] We reverse and remand.

The relevant facts follow. Mother and Father were married on February 28, 1986, and had two children, W.H., born May 1991, and B.H., born December 1993. The trial court entered a dissolution of the parties' marriage in January 2003. The parties had joint legal custody of the children with Mother having physical custody. Father was ordered to pay $193.00 per week in child support.

In October 2007, Father filed a petition to modify custody and child support. Father requested custody of B.H. and a modification of child support as a result. At the February 2008 hearing, Mother and Father agreed that Father would have custody of B.H. **(Transcript at 3, 39)** Father suggested that his child support obligation be $70.00 per week based upon his base salary, with a quarterly review of his income to determine his overtime and a supplemental payment of 12.7% of his overtime. Father also based his calculation on Mother having 52 days of parenting time with B.H. Mother suggested that Father's child support obligation be $167.00 per week based upon his base salary with overtime and bonuses. Mother also based her calculation on 98 days of parenting time with B.H.

[1] We note that Father has failed to file an appellee's brief. When the appellee fails to submit a brief, we need not undertake the appellee's burden of responding to arguments that are advanced for reversal by the appellant. Hamiter v. Torrence, 717 N.E.2d 1249, 1252 (Ind. Ct. App. 1999). Rather, we may reverse the trial court if the appellant makes a prima facie case of error. Id. "Prima facie" is defined as "at first sight, on first appearance, or on the face of it." Id.

The trial court ordered Father to pay $70.00 per week in child support but did not order Father to conduct a quarterly review of his income to determine his overtime or order payment of 12.7% of his overtime. The trial court also ordered Mother to have parenting time with B.H., but gave a parenting time credit of 52 overnights.

The issue is whether the trial court's calculation of child support is clearly erroneous. "We place a 'strong emphasis on trial court discretion in determining child support obligations' and regularly acknowledge 'the principle that child support modifications will not be set aside unless they are clearly erroneous.'" Lea v. Lea, 691 N.E.2d 1214, 1217 (Ind. 1998) (quoting Stultz v. Stultz, 659 N.E.2d 125, 128 (Ind. 1995)). "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Quillen v. Quillen, 671 N.E.2d 98, 102 (Ind. 1996). A judgment is clearly erroneous if it relies on an incorrect legal standard. Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210 (Ind. 2000), reh'g denied. We give due regard to the trial court's ability to assess the credibility of witnesses. Id. While we defer substantially to findings of fact, we do not do so to conclusions of law. Id. We do not reweigh the evidence; rather we consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. Yoon v. Yoon, 711 N.E.2d 1265, 1268 (Ind. 1999).

Mother argues that, in calculating the child support owed by Father, the trial court deviated from the Indiana Child Support Guidelines without explanation. Specifically, Mother argues that the trial court made an error in calculating the amount of Father's weekly gross income and in calculating Mother's parenting time credit.

Ind. Child Support Rule 2 provides: "In any proceeding for the award of child support, there shall be a rebuttable presumption that the amount of the award which would result from the application of the Indiana Child Support Guidelines is the correct amount of child support to be awarded." Further, Ind. Child Support Rule 3 provides: "If the court concludes from the evidence in a particular case that the amount of the award reached through application of the guidelines would be unjust, the court shall enter a written finding articulating the factual circumstances supporting that conclusion." Thus, any deviations from the Child Support Guidelines must be explained by the trial court. See, e.g., Grant v. Hager, 868 N.E.2d 801, 804 (Ind. 2007) (noting the trial court could deviate from the child support guidelines if it made the required written findings).

We first address Father's weekly gross income. The Child Support Guidelines define weekly gross income as "income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, [and] overtime . . . ." Ind. Child Support Guideline 3(A)(1). The commentary to the Guidelines provides:

> There are numerous forms of income that are irregular or nonguaranteed, which cause difficulty in accurately determining the gross income of a party. Overtime, commissions, bonuses, periodic partnership distributions, voluntary extra work and extra hours worked by a professional are all illustrations, but far from an all-inclusive list, of such items. Each is includable in the total income approach taken by the Guidelines, but each is also very fact-sensitive.
>
> Each of the above items is sensitive to downturns in the economy. The fact that overtime, for example, has been consistent for three (3) years does not guarantee that it will continue in a poor economy. Further, it is not the intent of the Guidelines to require a party who has worked sixty (60) hour weeks to continue doing so indefinitely just to meet a support obligation that is based on that higher level of earnings. Care should be

> taken to set support based on dependable income, while at the same time providing children with the support to which they are entitled.
>
> *When the court determines that it is not appropriate to include irregular income in the determination of the child support obligation, the court should express its reasons.* When the court determines that it is appropriate to include irregular income, an equitable method of treating such income may be to require the obligor to pay a fixed percentage of overtime, bonuses, etc., in child support on a periodic but predetermined basis (weekly, bi-weekly, monthly, quarterly) rather than by the process of determining the average of the irregular income by past history and including it in the obligor's gross income calculation.
>
> One method of treating irregular income is to determine the ratio of the basic child support obligation (line 4 of the worksheet) to the combined weekly adjusted income (line 3 of the worksheet) and apply this ratio to the irregular income during a fixed period. For example, if the basic obligation was $110.00 and the combined income was $650.00, the ratio would be .169 ($100.00 / $650.00). The order of the court would then require the obligor to make a lump sum payment of .169 of the obligor's irregular income received during the fixed period.
>
> The use of this ratio will not result in an exact calculation of support paid on a weekly basis. It will result in an overstatement of the additional support due, and particularly so when average irregular income exceeds $250.00 per week or exceeds 75% of the regular adjusted weekly gross income. In these latter cases the obligor may seek to have the irregular income calculation redetermined by the court.

Ind. Child Support Guideline 3, Commentary (2)(b) (emphasis added).

Here, the trial court calculated Father's child support based upon his base salary without consideration of his overtime or bonuses. However, the trial court did not explain its reasons for doing so. Therefore, we reverse the trial court's exclusion of the overtime and bonus income, and we remand with instructions to either calculate Father's income as outlined in the Child Support Guidelines or, if the trial court excludes the overtime and bonuses, to issue written findings explaining the deviation. See, e.g., Thompson v. Thompson, 696 N.E.2d 80, 83-84 (Ind. Ct. App. 1998) (reversing and

remanding the trial court's exclusion of the father's overtime and bonus income from his weekly gross income).

Mother also argues that the trial court's child support calculation is clearly erroneous because it failed to properly calculate the parenting time credit. Father suggested that Mother receive parenting time of every other weekend and one evening per week without extended parenting time during the summer. Mother requested parenting time pursuant to the Parenting Time Guidelines. The trial court awarded Mother "parenting time visitation" with B.H. Appellant's Appendix at 9. However, in calculating child support, the trial court gave Mother credit for only 52 overnights. Mother argues that she was entitled to credit for 98 overnights.

"With the adoption of the Indiana Parenting Time Guidelines, the noncustodial parent's share of parenting time, if exercised, is equivalent to approximately 27% of the annual overnights." Ind. Child Support Guideline 6, Additional Commentary. "If the parents are using the Parenting Time Guidelines without extending the weeknight period into an overnight, the noncustodial parent will be exercising approximately 98 overnights." Id. Based upon the Parenting Time Guidelines, Mother was entitled to credit for 98 overnights. Consequently, the trial court's use of 52 overnights in calculating Mother's parenting time credit without an explanation of the deviation was clearly erroneous. On remand, we direct the trial court to recalculate Mother's parenting time credit in accordance with the Ind. Child Support Guidelines or explain the deviation.

For the foregoing reasons, we reverse the trial court's child support order and remand with instructions.

Reversed and remanded.

BAKER, J. and MATHIAS, J. concur